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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESSE DWAYNE FLEMONS, Appellant.	2 CA-CR 2007-0255 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051513

Honorable Kenneth Lee, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury found appellant Jesse Flemons guilty of manslaughter and drive-by shooting, the trial court sentenced him to consecutive, presumptive prison terms of 10.5 years on each count. On appeal, Flemons contends the trial court erred by instructing the jury on accomplice liability and imposing consecutive sentences. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Garza*, 216 Ariz. 56, n.1, 163 P.3d 1006, 1011 n.1 (2007). One evening in March 2005, Flemons and two other men, "J.J." Murry and James Johnson, went to a Tucson nightclub, where they were patted down and "wanded" for weapons before entering. When the club was closing, the three left and entered Flemons's car, with Flemons in the driver's seat, Murry in the front passenger seat, and Johnson in the back. After driving once around the parking lot, Flemons produced a gun and fired multiple times out of the front passenger window in the direction of people standing near or sitting in other vehicles in the parking lot. Anthony S. was shot in the head and torso and died shortly thereafter from the gunshot wound to his head.

Accomplice Instruction

¶3 Flemons first contends the trial court erred by instructing the jury on accomplice liability, asserting "there was no evidence demonstrating that [Flemons] acted in concert with any other person." We review the court's decision to give a jury instruction

for an abuse of discretion. *Garza*, 216 Ariz. 56, ¶ 42, 163 P.3d at 1016. "An accomplice instruction should be given only if reasonably supported by the evidence." *State v. Baldenegro*, 188 Ariz. 10, 13, 932 P.2d 275, 278 (App. 1996). As Flemons correctly notes, "[a] trial court commits reversible error when it instructs on an issue or theory that is not supported by evidence because it 'invites the jury to speculate as to possible non-existent circumstances.'" *State v. Speers*, 209 Ariz. 125, ¶ 27, 98 P.3d 560, 567 (App. 2004), *quoting Herman v. Sedor*, 168 Ariz. 156, 158, 812 P.2d 629, 631 (App. 1991).[1]

¶4 Flemons argues there was insufficient evidence to show he was an accomplice if Murry, the front-seat passenger, was the shooter, especially when the state never argued or believed that Murry had fired the shots. The state counters that, although it maintained Flemons was the shooter, his defense was to blame Murry. The state further argues "the evidence Murry did not have a gun that evening and was in [Flemons]'s car permits an inference that, if Murry was the shooter, [Flemons] supplied him the gun" and "[b]y driving the car, [Flemons] also further provided the means and opportunity for Murry to commit the offenses and/or aided him in committing them."

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[1]Although Flemons seems to also suggest the accomplice instruction incorrectly stated the law, he has failed to properly develop this argument and we do not consider it on appeal. *See* Ariz. R. Crim. P. 31.13(c)(vi) (appellant's brief must contain argument with citations to authority); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 (2004) ("'[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶5 At the outset, we note that an accomplice instruction may be proper even when the state's theory is that the defendant had acted alone. *See, e.g., Garza*, 216 Ariz. 56, ¶¶ 42-43, 163 P.3d at 1016 (accomplice instruction upheld where defendant's blood was found on passenger side of car, suggesting someone else was the driver, and defense argued driver had committed the murders); *State v. Lang*, 176 Ariz. 475, 486, 862 P.2d 235, 246 (App. 1993) (accomplice instruction proper even though state "never seriously argued that the defendant and an accomplice killed the victim" because "the defendant posited that two people might have been involved," and thus "the state was entitled to an instruction that told the jury that the defendant could be guilty even though another person participated in the killing").

¶6 Sufficient evidence was presented at trial to support an accomplice instruction. The evidence included testimony that Murry did not have a gun on the night of the shooting; that, if Murry were the shooter, the gun was in Flemons's car; and, that Flemons had been known to have possessed guns in the past, and therefore, Murry could have obtained the gun from Flemons. In addition, there was evidence the gun could have been fired from outside the passenger window. Flemons, Murry, the victim, and James Moore, who was with the victim when he was shot, all knew each other and Moore had an ongoing dispute with Flemons's brother. Additionally, Moore and Murry had fought in the past. After the shooting, Murry was not truthful with the police, told Johnson not to say anything to police about the incident, and later admitted disposing of the murder weapon. This evidence

supported a theory that Murry might have been the shooter with Flemons's assistance, either in providing the gun, positioning the car, or both. The trial court did not abuse its discretion in instructing the jury on accomplice liability, given the evidence presented. *See, e.g.*, *State v. Marlow*, 163 Ariz. 65, 69, 786 P.2d 395, 399 (1989) (accomplice instruction proper where some evidence could have "supported an inference that [defendant's friend] killed the victim with the defendant's assistance"); *Baldenegro*, 188 Ariz. 10, 13, 932 P.2d 275, 278 (accomplice instruction proper because, even if defendant had not fired gun, jury reasonably could have concluded he attempted or agreed to aid shooter to commit offenses in light of way he had driven vehicle); *Lang*, 176 Ariz. at 486, 862 P.2d at 246 (accomplice instruction reasonably supported by evidence where there was "some slight suggestion" that more than one person was at the victim's house the night of the murder and defendant argued that someone else committed the murder).[2]

Consecutive Sentences

¶7 Flemons next argues the trial court's imposition of consecutive prison terms violated A.R.S. § 13-116, the statutory prohibition against double punishment, because both offenses occurred at the same time and arose from the same act. Section 13-116 provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent."

[2]Because we have determined there was sufficient evidence to support the accomplice instruction, we need not discuss the additional evidence regarding Flemons's possible connection with another alleged drive-by shooting at the club that night.

Accordingly, under § 13-116, "a trial court may not impose consecutive sentences for the same act." *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). We review *de novo* whether consecutive sentences are permissible under § 13-116. *Id.*

¶8 In order to determine whether conduct constitutes a single act for purposes of § 13-116, we apply the following test as set forth by our supreme court in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989):

> [W]e will . . . judge a defendant's eligibility for consecutive sentences by considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge–the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

State v. Anderson, 210 Ariz. 327, ¶ 140, 111 P.3d 369, 400 (2005), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (alterations in *Anderson*).[3]

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[3]The state initially argues there is no need to conduct a *Gordon* analysis because Flemons fired multiple shots and there were other people in the area at the time who could be considered additional victims of the drive-by shooting. However, because all of the shots occurred within moments of each other, we apply *Gordon* here. *See, e.g., State v. Alexander*,

¶9 Under the first part of the *Gordon* analysis, we initially must determine whether manslaughter or drive-by shooting was the "ultimate charge–the one that is at the essence of the factual nexus and that will often be the most serious of the charges." *Urquidez*, 213 Ariz. 50 at ¶ 7, 138 P.3d at 1179. Here, the state argues that drive-by shooting is the ultimate offense and Flemons contends it is manslaughter. This is a close question, in part because both drive-by shooting and manslaughter are class two felonies. A.R.S. §§ 13-1103(C); 13-1209(D). However, because drive-by shooting requires intentional conduct, as opposed to the reckless conduct necessary for manslaughter, and because it appears to be more at the heart of the factual nexus of the incident, we conclude that drive-by shooting was the ultimate offense. *See* §§ 13-1103(A)(1) (a person commits manslaughter by recklessly causing the death of another person); 13-1209(A) (a person commits drive-by shooting by intentionally discharging a weapon at a person, occupied motor vehicle, or occupied structure).[4]

¶10 Having determined drive-by shooting is the ultimate offense, we then subtract the evidence necessary to convict Flemons of that offense and decide whether there is sufficient evidence remaining to establish the elements of manslaughter. The evidence

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175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993) (explaining *Gordon* analysis determines "whether a single criminal episode can result in multiple punishments").

[4]Our analysis would be different had the jury found Flemons guilty of murder. However, because Flemons was convicted of manslaughter, it would be improper for us to assume that manslaughter was the ultimate offense only because Flemons originally was charged with first-degree murder. To hold otherwise would give more weight to the charge filed against Flemons than to the jury's verdict.

necessary for the drive-by shooting includes Flemons's (1) intentionally discharging a weapon, (2) from a motor vehicle, (3) at a person, another occupied motor vehicle or an occupied structure. A.R.S. § 13-1209(A); *State v. Torres-Mercado*, 191 Ariz. 279, 283, 955 P.2d 35, 39 (App. 1997). Notably, the offense of drive-by shooting "criminalizes conduct, not conduct causing a particular result," and "[u]nlike offenses that require specific results as elements, the offense of drive-by shooting is complete no matter where the bullets went or whether any injury or damage occurred." *State v. Siner*, 205 Ariz. 301, ¶ 12, 69 P.3d 1022, 1024-25 (App. 2003).

¶11 The state argues "the drive-by shooting offense was completed the moment Appellant intentionally fired any of the bullets other than the fatal one from his car at the people and occupied vehicles in the parking lot, regardless of what happened next." And, the state urges, the remaining evidence that Flemons "also fired the fatal bullet" satisfies the elements of manslaughter. We agree the remaining evidence would be sufficient to convict Flemons of manslaughter, which encompasses his firing the bullet that killed Anthony S. *See* A.R.S. § 13-1103(A)(1) (manslaughter is recklessly causing the death of another person); *cf. State v. Miranda*, 198 Ariz. 426, 429-30, 10 P.3d 1213, 1216-17 (App. 2000) (upholding consecutive sentences for three counts of disorderly conduct where each of three shots fired by defendant "constituted a separate act"). Accordingly, we find that under the first part of the *Gordon* test consecutive sentences may be permissible.

¶12 Proceeding to the next part of the *Gordon* test, we consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Anderson*, 210 Ariz. 327, ¶ 140, 111 P.3d at 400. Because it was possible for Flemons to commit drive-by shooting without also committing manslaughter, this prong also supports consecutive sentences. *See id*. ¶ 144 (holding defendant could have committed murder without committing armed robbery); *cf. Urquidez*, 213 Ariz. 50, ¶ 9, 138 P.3d at 1179 (holding it was impossible for defendant, who was convicted felon, to commit aggravated assault with a deadly weapon without also committing the crime of prohibited possession of a deadly weapon).

¶13 Although there is arguably conflicting authority as to whether it is necessary to proceed to the third *Gordon* factor,[5] we conclude there is no reason to do so here because § 13-116 only prohibits consecutive punishments of the same act, our analysis of the first two factors has conclusively demonstrated that Flemons's conduct constituted multiple acts, and no additional analysis could alter this conclusion or is necessary once this determination has been made. *See Gordon*, 161 Ariz. 308, 315, 778 P.2d at 1211 (explaining that if the analysis of the first and second factors indicates there was a single act under § 13-116, the court "will then consider" the third factor); *see also Anderson*, 210 Ariz. 327, ¶ 143, 111 P.3d at 400

[5]*See State v. Roseberry*, 210 Ariz. 360, ¶¶ 58-62, 111 P.3d 402, 412-13 (2005) (reaching third part of *Gordon* analysis without discussion even though first two parts of test supported consecutive sentences); *Anderson*, 210 Ariz. 327, ¶ 144, 111 P.3d 369, 400-01 (same); *State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 169, 177 (1993) (same).

(determining offenses were not a "single act" under § 13-116 after concluding second part of *Gordon* analysis); *State v. Carreon*, 210 Ariz. 54, ¶¶ 104-06, 107 P.3d 900, 920-21 (2005) (same); *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (explaining *Gordon* does not require reaching third factor if consecutive sentences are permissible under first two factors); *accord Urquidez*, 213 Ariz. 50, ¶ 9, 130 P.3d at 1179 (court proceeded to final *Gordon* factor because analysis of first and second factors was not determinative); *cf. State v. Price*, 218 Ariz. 311, n.5, 183 P.3d 1279, 1284 n.5 (App. 2008) (rejecting argument that *Gordon* analysis may end after analyzing only first factor); *State v. Siddle*, 202 Ariz. 512, ¶ 18, 47 P.3d 1150, 1156 (App. 2002) (analyzing all three factors where first and second yielded contradictory results).

¶14 Because under *Gordon*, the offenses Flemons committed were based on multiple acts, the trial court was not required to impose concurrent sentences pursuant to § 13-116.

Disposition

¶15 For the reasons above, Flemons's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge